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May 9, 2017

## VIA FCC ECFS

Ms. Marlene H. Dortch, Secretary  
Federal Communications Commission  
445 12th Street, SW  
Washington, D.C. 20554

*Re: Procedures for Commission Review of State Opt-Out Requests from the FirstNet Radio Access Network (PS Docket No. 16-269); Implementing Public Safety Broadband Provisions of the Middle Class Tax Relief and Job Creation Act of 2012 (PS Docket No. 12-94); Implementing a Nationwide, Broadband, Interoperable Public Safety Network in the 700 MHz Band (PD Docket No. 06-229); and Service Rules for the 698-746, 747-762 and 777-792 MHz Bands (WT Docket No. 06-150)*  
- ***Ex Parte Communication***

Dear Ms. Dortch:

This firm represents the Colorado Office of Information Technology (“OIT”) and the FirstNet Colorado Governing Body (“FirstNet Colorado”) in connection with the matters discussed in this letter. OIT and FirstNet Colorado have filed Comments and Reply Comments in the above referenced proceeding. Additionally, in March 2017, I, along with Brian Shepherd, OIT Broadband Program Manager and Bob Fifer, Arvada, Colorado Mayor Pro Tem and Vice Chair of FirstNet Colorado, participated in meetings and/or conference calls with the following Commission Staff:

Zenji Nakazawa, Acting Public Safety and Consumer Protection Advisor  
- Chairman Ajit Pai’s Office  
Erin McGrath, Legal Advisor -- Wireless, Public Safety and International  
- Commissioner O’Rielly’s Office  
Daudeline Meme, Legal Advisor -- Wireless, International and Public Safety  
- Commissioner Mignon Clyburn’s Office  
Brian Marengo, Electronics Engineer, Policy and Licensing  
- Public Safety and Homeland Security Bureau  
Rasoul Safavian, Senior Technical Advisor  
- Public Safety and Homeland Security Bureau  
Roberto Mussenden, Attorney Advisor, Policy and Licensing  
- Public Safety and Homeland Security Bureau  
Erika E. Olsen, Senior Legal Counsel  
- Public Safety and Homeland Security Bureau

As a follow up to the conversations we had in March 2017 with the above named individuals, on March 8, 2017 we submitted the attached *Memorandum Regarding FCC Authority to Require FirstNet to Grant Access to Its Network Policies*.

Pursuant to Rule 1.1206 of the Commission's Rules, an electronic copy of this letter and the attached Memorandum are being filed via the Electronic Comment Filing System (ECFS) in this matter.

Please feel free to contact me with any additional questions or concerns you may have.

Very truly yours,



Kenneth S. Fellman, Esq.  
[kfellman@kandf.com](mailto:kfellman@kandf.com)

KSF/eaj

cc: Zenji Nakazawa, Acting Public Safety and Consumer Protection Advisor  
- Chairman Ajit Pai's Office ([zenji.nakazawa@fcc.gov](mailto:zenji.nakazawa@fcc.gov))  
Erin McGrath, Legal Advisor -- Wireless, Public Safety and International  
- Commissioner O'Rielly's Office ([erin.mcgrath@fcc.gov](mailto:erin.mcgrath@fcc.gov))  
Daudeline Meme, Legal Advisor -- Wireless, International and Public Safety  
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Honorable Bob Fifer, City of Arvada, Colorado  
- ([bfifer@arvada.org](mailto:bfifer@arvada.org))  
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## MEMORANDUM

TO: Zenji Nakazawa, Acting Public Safety and Consumer Protection Advisor  
- Chairman Ajit Pai's Office  
Erin McGrath, Legal Advisor -- Wireless, Public Safety and International  
- Commissioner O'Rielly's Office  
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- Public Safety and Homeland Security Bureau

FROM: Ken Fellman, Esq.

CC: Brian Shepherd, Broadband Program Manager  
Kim Coleman Madsen, Broadband Implementation Manager  
Hon. Bob Fifer, Mayor Pro Tem, City of Arvada

RE: FCC Authority to Require FirstNet to Grant Access to Its Network Policies

DATE: May 8, 2017

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On March 13, 2017, representatives of the FirstNet Colorado Governing Body (FNCGB) met with most of you. On March 20, 2017 we had a conference call with Ms. Meme. The meetings and calls were for the purpose of discussing various concerns with the Federal Communications Commission's (the "Commission's") implementation of the Middle Class Tax Relief and Job Creation Act of 2012 (hereinafter "the Spectrum Act") as it relates to the First Responder Network Authority ("FirstNet"). During these meetings we stressed that one of FNCGB's concerns is that currently states do not have access to FirstNet's Network policies. In response, we were asked to provide an analysis the legal authority the Commission had to compel FirstNet to expeditiously release its network policies. This memo provides that analysis.

As previously noted in our Comments in this docket, a major concern of the FNCGB and all other potential opt-out states is the lack of access to FirstNet's network policies. This has created a real fear that states will not have access to FirstNet's network policies until well after it is possible to develop an alternative state plan that complies with such policies.<sup>1</sup> Currently, it is unclear what the network policies even consist of other than that opt-out states will have to comply with them.<sup>2</sup> To the extent that the network policies relate to interoperability, they are a key piece of the network design of any state alternative plan and need to be accessible as soon as possible in order for a state to have a realistic chance at designing a compliant network. FirstNet has only committed to provide access to the network policies as "expeditiously as possible," without any real timeframe.<sup>3</sup> This is not enough. The Commission also needs access to these policies to begin its work to develop its process for determining whether states seeking to opt-out have met all necessary requirements. The FNCGB urges the Commission to put a deadline on FirstNet to divulge their unseen network policies, preferably at least 90 days before delivery of the state plan created by FirstNet. This time frame will benefit both the Commission and each state.

Section 6302(e) of the Spectrum Act sets forth the standards for state opt-out plans. Section 6302(e)(c)(i)-(iv) lays out the role of the Commission in evaluating alternative state plans. Under this section the Commission must evaluate whether a state has demonstrated:

- (I) that the State will be in compliance with the minimum technical interoperability requirements developed under section and
- (II) interoperability with the nationwide public safety broadband network.

To the extent that FirstNet's network policies concern interoperability, they are a critical part of the Commission's statutorily created review role in Section 6302(e)(c)(i)(II).

Just as the states cannot design a compliant network without having access to the network policies, the Commission cannot evaluate a state plan for interoperability without having access to the network policies. It is the Commission's role alone to decide whether state alternative plans comply with FirstNet's network policies.<sup>4</sup> Because it is the Commission's role in the Spectrum Act to evaluate alternative state plans against the network policies, the Commission necessarily has the power to demand that FirstNet divulge those same network policies in a manner that will provide the Commission the time necessary to carry out its statutorily required obligations.

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<sup>1</sup> Comments of the FirstNet Colorado Governing Body, pg. 6.

<sup>2</sup> *See id.*

<sup>3</sup> Richard Reed, FirstNet Chief Customer Officer, *FirstNet Outlines Key Steps for Development of State Plans, Interoperability Requirement* (July 8, 2016) available at <http://firstnet.gov/newsroom/blog/firstnet-outlines-keysteps-development-state-plans-interoperability-requirements>.

<sup>4</sup> *See* Comments of the First Responders Network Authority, pg. 7 ("The Commission's statutory requirement is to either 'approve' or 'disapprove' an alternative plan, and there is no need for that decision to involve an entity other than the FCC, an opt-out state/territory, and FirstNet.")

While no explicit statutory exists for the Commission to compel this action, the Commission's role under the Spectrum Act would be impossible to carry out if no such power existed. Longstanding principles of administrative law support this result. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984) (holding when a statute is silent or ambiguous with respect to specific language in a statute, it is up to the administrative agency to effectuate Congressional intent). In compelling FirstNet to give the Commission access to its network policies, prior to delivery of FirstNet's plans to each state governor, the Commission will have the time necessary to determine how it will evaluate any opt out requests for interoperability – but it cannot create the details of that process without access to these network policies. For example, if, despite not obtaining the FirstNet network policies until the state plan is delivered, a state chooses to seek Commission approval of an alternative plan relatively soon after the delivery of the FirstNet plan to the governor, say within a month, the Commission will be ill-equipped to evaluate the necessary interoperability issues. The 180 day window to complete the opt out process will have opened, and if the Commission is not fully prepared to address the issues, the state's ability to opt out will be compromised.

At the same time, the public availability of the network policies will benefit states as well as the Commission. This availability will serve both the Commission's role in ensuring network interoperability as well as carrying out Congress's intent to give states a real choice to either accept FirstNet created state plans or create alternative state plans.

Consequently, the FNCGB asks the Commission to compel FirstNet to divulge its network policies *at least 90 days* before delivery of the state plans so that the Commission may have sufficient time to plan for evaluating state alternative plans against the network policies and so that states considering opting out will have sufficient time, and therefore a real opportunity to design an alternative state plan which will conform with the interoperability requirements to be evaluated by the Commission.